

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1385

To be argued by
JULIAN G. LINKER

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1385

UNITED STATES OF AMERICA,

Appellant.

--against--

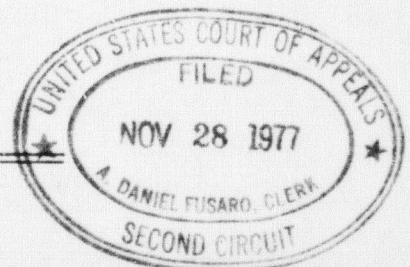
CANDIDO NATAL RIQUELMY and FELIX LOPEZ,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE FELIX LOPEZ

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1385

UNITED STATES OF AMERICA,
Appellant

v.

CANDIDO NATAL RIQUELMY and FELIX LOPEZ,
Appellees

BRIEF FOR APPELLEE FELIX LOPEZ

PRELIMINARY STATEMENT

This is an appeal by the United States, pursuant to 18 U.S.C. § 3731, from an order of the United States District Court for the Eastern District of New York (Mark A. Costantino, J.) entered on August 3, 1977, granting appellees' motion to suppress a quantity of heroin recovered from a jacket being held by co-defendant-appellee, Eddie Riquelmy, after all three appellees had previously been stopped outside LaGuardia Airport by Special Agent Gerard Whitmore and taken together into an inside airport lounge where the search was made in the presence of all three defendants.

STATEMENT OF FACTS

Prior to trial all three appellees moved to suppress the narcotics seized from the coat being held by one of them. No objection was made by appellant United States of America to the standing of any of the appellees to make the motion to suppress.

At no time during the entire lengthy Hearing on the motion to suppress was any objection made to the standing of any of the appellees to make the motion to suppress. No evidence was offered by the Government to show that appellees Lopez and Candido Riquelmy had no standing and no motion or objection as to the standing of any appellee was made by the Government at the conclusion of the Hearing. The first time the issue of standing was raised by the prosecution was as one of several points in its Memorandum of Law submitted to the Court many weeks after the Hearing.

The sole witness at the Hearing was Agent Whitmore who testified that at LaGuardia Airport he observed the three defendants leave a domestic American Airlines shuttle flight from Chicago; walking one behind the other in a triangle fashion; they did not pick up any luggage, exited the terminal, then came together, talked for the first time and got onto a taxicab line together with other passengers.

Based solely upon the above "profile" information and without any other information or evidence whatsoever of any wrongdoing by any of the defendants, AGENT WHITMORE approached the three, identified himself as a Federal Narcotics Officer and began questioning them. According to AGENT WHITMORE defendant CANDIDO RIQUELMY stated they had come from California (later he stated that he meant Chicago); when asked to produce tickets and identification defendant CANDIDO RIQUELMY produced a Pennsylvania license in his name and an airlines ticket in the CANDIDO NATAL (his correct middle name); defendant FELIX LOPEZ produced a New York drivers license in his own name and an airlines ticket in the name of

T. PUENTE; the defendant EDDIE RIQUELMY did not have his airlines ticket and produced a green union identification card in his own name and his own picture, which, according to the Agent, looked suspicious.

The Agent then testified: "Because I was alone I asked them to please accompany me inside the lobby, especially EDDIE RIQUELMY."

They went inside to the baggage claims area and the Agent then testified: "I told CANDIDO RIQUELMY to go to the phone booths and I would question EDDIE RIQUELMY a few minutes (emphasis supplied)."

Then the Agent requested LOPEZ to likewise go to the phone booths. The Agent then asked a uniformed Port Authority Policeman to assist him and to be a witness that EDDIE RIQUELMY "had given me an identification that I was not satisfied with."

AGENT WHITMORE then went back to EDDIE RIQUELMY and asked him for some more identification. EDDIE RIQUELMY was carrying a leather jacket and began to reach into one of the pockets. AGENT WHITMORE then reached over, said he would take the identification himself, took the jacket away, felt a bulge, removed it from the jacket, and identified it as a crystalline substance resembling heroin.

AGENT WHITMORE then stated he placed all three defendants under arrest.

On cross-examination AGENT WHITMORE conceded that other passengers likewise walked through the baggage area at the same pace and without talking and further conceded that he had signed

an affidavit wherein he swore that the defendants were engaged in conversation with each other when they alighted from the plane.

As set forth above, no objection to standing of any of the three appellees was made at the Hearing and no evidence was offered by either the prosecution or appellees on that issue.

THE ISSUES PRESENTED

1. Does Felix Lopez (and Candido Riquelmy) have standing, under all counts of the Indictment, to contest the admittedly illegal search and seizure of contraband from a jacket being held over the arm of a co-defendant standing next to them?

2. Should the prosecution be allowed to raise the issue of standing after it has failed to do so until long after all three appellees joined in the Motion to Suppress and participated fully in the Hearing thereon?

STATEMENT OF LAW

POINT 1

ALL THREE APPELLEES WERE STOPPED AT THE SAME TIME AND IN THE SAME PLACE. THE NARCOTICS WAS SEIZED AS THE RESULT OF AN ILLEGAL SEARCH OF A JACKET HELD BY ONE OF THEM.

CLEARLY, ALL THREE APPELLEES HAVE STANDING UNDER ALL COUNTS TO THE CONCEDEDLY ILLEGAL SEARCH AND SEIZURE.

After filing its Notice of Appeal against all three appellees on all three counts of the Indictment the Government now withdraws its appeal on all three counts as to Eddie Riquelmy

(the man carrying the jacket containing narcotics) and, further, withdraws its appeal of the possession count as against the two remaining appellees. Succinctly stated, the Government's position is that although they have no case against the man allegedly possessing the narcotics, they can nevertheless proceed via Conspiracy and Travel Act counts against all persons found in the possessor's vicinity. This, despite the fact of Agent Whitmore's clear testimony that he had absolutely no evidence of any crime when he made what is now concluded to be a clearly illegal search and seizure. (The Government has on this appeal totally abandoned the so-called 'airport profile' as giving any reason for the illegal search and seizure.)

We respectfully submit that adopting the Government's technical interpretation of 'standing' so as to enable it to use the fruits of an illegal search and seizure against 'bystander appellees' while freeing appellees in possession would not only lead to results unfair on their face, but would also inevitably lead to a total breakdown of the Fourth Amendment safeguards against search and seizures. For, obviously, the Government's position, if adopted, would turn loose a veritable torrent of blatantly illegal searches and seizures throughout the country. Airports, streets, lobbies, apartment hallways, and all other imaginable 'public places' would be overrun with Government agents searching everybody and anybody at random.* Immediately upon finding anyone in possession of contraband all by-stander appellees would promptly be arrested and charged with conspiracy or some other non-possessionary crime. The one in possession of the contraband

*Of course, the search would technically be preceded by an attempted Terry excuse for stopping. (See Terry v. Ohio, 392 U.S. 1 (1969)).

would, of course, just as promptly be freed (and, perhaps, given some kind of medal for his invaluable assistance). Arrests and prosecutions of the 'by-stander appellees' would multiply by the thousands, limited only by law-enforcement budgetary considerations. New chapters would be entered in the annals of successful law enforcement. The only problems, of course, would be that many of the (by-stander appellees' would be totally innocent and that the Fourth Amendment protections would be irreparably emasculated.

Turning to the instant case, we respectfully adopt the recent decision in United States v. Westerbann-Martinez, - F. Supp., Docket No. 77 Cr. 208 (E.D.N.Y. July 19, 1977) (A. 216,219). In an almost identical fact pattern, the Court held with regard to 'standing':

Although he does not have automatic standing on those counts, defendant Torres does have actual standing on Counts Two and Three to object to the seizure. Standing to object to a search and seizure may be based upon presence at the time of the search. United States v. Galante, 547 F. 2d 733, 739: cf. Brown v. United States, supra at 229, and there is no dispute that Torres was present during the search of Westerbann. The government argues, however, that since the search occurred in a public airline terminal, Torres had no reasonable expectation of privacy. This argument ignores the fact that the Fourth Amendment protects "people not places." Katz v. United States, 389 U.S. 347, 351 (1967). Constitutional protection of privacy under the Fourth Amendment is not lost "even in an area accessible to the public." Id. 351-352. The "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." Terry v. Ohio, supra, at 8-9.

Furthermore, Torres has actual standing on Counts Two and Three for other reasons. When Rose stopped Torres and Westerbann for questioning, he restrained their freedom to walk away, and thereby "seized" both defendants within the meaning of the Fourth Amendment. Terry v. Ohio, supra at 16-19; United States v. Brignoni Ponce, 422 U.S. 873, 878 (1975); United States v. Chamblis, 425 F. Supp. 1330, 1332, (E.D. Mich. 1977); United States v. Pruss, 5-81244 (E.D. Mich. Jan. 14, 1976), aff'd, ___ F.2d ___ (6th Cir. 1976).

Both Torres and Westerbann were "seized" simultaneously. That "seizure" was based to a large extent upon Agent Rose's interpretation of the interaction of Torres and Westerbann including what Rose thought to be their desire to avoid the appearance of being together in the terminal, followed by their conversation once outside the terminal. Both Torres and Westerbann were questioned together. And it was the search of Westerbann's bag and seizure of heroin therefrom, that led immediately and directly to Torres' arrest. It is clear that Rose did not view Torres and Westerbann individually or separately but rather collectively - in a certain sense he view them as a unit. Therefore, Torres was the "victim of an invasion of privacy," Jones v. United States, supra at 261; Alderman v. United States, 394 U.S. 165, 173 (1969), and therefore has standing to object to the "seizure" itself and the introduction into evidence of any "fruits of its poisonous tree" including the heroin seized from Westerbann's bag. See Wong Sun v. United States, 371 U.S. 471 1963. (A. 229-231).

POINT 2

THE GOVERNMENT FAILED TO RAISE THE ISSUE OF 'STANDING' AT ANY TIME EITHER BEFORE, DURING OR AT THE CONCLUSION OF THE HEARING ON APPELLEES' NOTICE TO SUPPRESS.

ANY OBJECTION AS TO STANDING WAS WAIVED BY THE GOVERNMENT'S FAILURE TO RAISE THE ISSUE AT THE HEARING.

Had the Government seen fit to raise the issue of standing at any time during the Hearing on the Notice to Suppress the appellees and Candido Riquelmy would at least have had the opportunity to prove 'standing' had they so desired.

Agent Whitmore testified that the narcotics were found in a jacket held by one of the three. Had appellees' attorneys been informed that their clients' 'standing' would be contested they could have directed their cross-examination of Whitmore into unexplored areas. For example, on proper cross-examination Whitmore (whose arresting affidavit was in complete contradiction to his Hearing testimony as to appellees' converging together when they got off the flight) might have testified that more than one appellee had been in possession of the jacket prior to the arrest. Perhaps, even, appellee Candido Riquelmy might have testified that it was his jacket, lent to his brother the day before.* Clearly the appellees were gravely prejudiced by not being informed, prior to the Hearing, that they were being placed in the outlandish position of having to prove their own possession in order to have the charges dismissed.

*implicit in the foregoing, of course, is the terrible temptation for by-stander appellees to give perjured testimony so as to easily override the hyper-technical government-imposed 'standing requirement'.

CONCLUSION

All three appellees were stopped at the same time and in the same place. The narcotics was seized as the result of an illegal search of a jacket held by one of them.

Clearly, all three appellees have standing under all counts to the concededly illegal search and seizure.

The Government failed to raise the issue of 'standing' at any time either before, during or at the conclusion of the hearing on appellees' Notice to Suppress.

Any objection as to standing was waived by the Government's failure to raise the issue at the Hearing.

THE ORDER OF THE DISTRICT COURT GRANTING THE MOTION TO SUPPRESS AS TO ALL APPELLEES SHOULD BE AFFIRMED.

Respectfully submitted,

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